

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

Crl.MC.No. 2052 of 2007()

C.R.NO.11/07 OF EXCISE RANGE OFFICE, MALLAPPALLY,
PATHANAMTHITTA DISTRICT.

PETITIONER: ACCUSED NOS.2 & 3

1. GIRISH KUMAR, AGED 28 YEARS,
S/O. GOVINDANKUTTY, PATHALIL HOUSE,
POOTHAKUZHI P.O., PAMPADI, KOTTAYAM DISTRICT.
2. ANANDAVALLI, W/O. PONNAPPAN,
PARAYIL HOUSE, MUNDIYAPPALLY P.O.,
KAVIYOOR VILLAGE, THIRUVALLA, PATHANAMTHITTA DIST.

BY ADV. SRI.C.C.THOMAS

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
EXCISE INSPECTOR, EXCISE RANGE OFFICE,
MALLAPPALLY, PATHANAMTHITTA DISTRICT,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.GIKKU JACOB.

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 31/10/2007, ALONG WITH CRMC NO. 2564 OF 2007 WPC NO. 24408
OF 2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

**W.P.(c) No.24408 of 2007-E &
Crl.M.C.No. 2052 OF 2007**

Dated this the 31st day of October, 2007

JUDGMENT

Are the amendments to Rule 2(n) and Rule 9(2) of the Kerala Abkari Shops Disposal Rules, 2002 (for short 'the Rules') brought in by Ext.P3 Notification consequent to the decision of the Supreme Court in **State of Kerala** v. **Unni** (2007 (1) K.L.T. 151) and the later Notification – Ext.P4, legal valid and constitutional? Do they and the consequent prosecutions initiated against the petitioners herein deserve to be quashed? These are the questions that arise for consideration in these proceedings.

2. To the crucial and vital facts first. The petitioners are allegedly the licensees and their employees of toddy shops. They face prosecutions for offences punishable, inter alia, under Secs.57(a) and 56(b) of the Kerala Abkari Act (for short 'the Act'). The crux of the allegations raised against them is

that toddy which was allegedly kept in their premises for sale was found to contain ethyl alcohol in excess of 8.1%. The prosecution alleges that the ethyl alcohol present in excess of 8.1% in toddy is not a natural ingredient of toddy and is a foreign ingredient and that the same enhances the intoxicating quality of toddy kept in their possession for sale by the petitioners. It is further alleged that this amounts to violation of the conditions of licence issued to the petitioners for sale of toddy.

3. The definition of 'the concept of 'law' has been a vexing problem of jurisprudence. It may be safe to understand law as a set of rules of human behaviour and conduct, which are enforceable and which represent the quintessence of the trained (not lay) commonsense of the community and which seek to attain the result of harmony in society. Such understanding of the concept of law whether it be constitutional law, statutory law subordinate legislation or precedential law is essential for the law maker, the law enforcer and the law interpreter. One who

attempts to interpret the law whether statutory or subordinate or to subject the same to judicial review cannot undertake the mission without being conscious of what law is and what law ought to be.

4. That takes me to the first point. The soul of the provision of law which is to be interpreted or reviewed judicially has to be understood by the interpreter. The mischief which it seeks to prevent has got to be understood before any attempt is made to interpret the law or subject the same to judicial review.

5. The purpose behind the relevant provisions and the amendments in question are very clear and unambiguous. Notwithstanding Art. 47 of the Constitution, either because of the acceptance of what is regarded as the inevitable nature of the male species of the human being who allegedly loves inebriation or because of monetary considerations of the State anxious to fill its coffers, prohibition has not been introduced and enforced in the State of Kerala. Manufacture, distribution

and sale of liquor is permitted, though under very strict regulations. Such manufacture and sale can only be in strict compliance with the provisions of the regulatory statute – the Kerala Abkari Act. No person has a fundamental right to carry on trade in liquor. The State has the monopoly of controlling the manufacture and sale of liquor. It is the burden of the welfare State to ensure that consumers have the opportunity to get unadulterated and healthy alcoholic beverages, once it chooses to permit such sale under strict regulation and control.

6. Manufacture and sale of arrack stands prohibited in the State of Kerala with the introduction of Sec.8 of the Kerala Abkari Act. Sale of toddy is permitted. With the ban of arrack the common man who cannot afford Indian Made Foreign Liquor has to fall back on toddy to satisfy his thirst for alcoholic drinks. It is submitted at the Bar with the help of facts and figures that the total quantity of toddy that can possibly be produced from the trees from which toddy tapping is licensed will be insignificant and will not be sufficient to satisfy the requirement

of toddy in the State of Kerala. It is further submitted that the total value of such toddy legally produced falls much short of the total kist amount obtained on auction of the right to sell such toddy. These arguments remain as assertions with no tangible material for me to verify. Be that as it may, experience of the working of the Statute reveals that quite often what is sold as toddy is alleged to be not genuine toddy and is only liquor in which alcohol is added externally.

7. To make genuine toddy available for the consumer is the challenge before State. He has to be protected from persons who attempt to vend non-genuine toddy mixed with external alcohol. The history of the implementation of the ban on arrack reveals that it has been a long duel between the State interested in protecting the welfare of the consumer and the greedy abkari lobbies which attempt to sell non-genuine inebriating drinks in the name of toddy.

8. Amendments to Rule 2(n) and 9(2) of the Rules must in this context be looked at and understood in the background of

this mission of the State through law to ensure that genuine toddy and not some inebriating liquid is vended in the name of toddy. The purpose of the mission is absolutely genuine, honest and legal. How the result is achieved is the only problem.

9. The second aspect is about the cannons of interpretation of a penal statute. The golden thread that runs through the entire fabric of criminal jurisprudence in this country is that when two interpretations are possible either on facts or on law, the one favourable to the accused/indicttee will have to be accepted. There can be no dispute about this proposition of law. But it is equally well settled that it must be shown that two reasonable views are possible competing with each other. Merely because one argument/interpretation is possible, such view in favour of the accused cannot be accepted. The view in favour of the accused must also be reasonable, consistent with the text, context, purpose and destination. It is by now well settled that the cannons of purposive interpretation must be followed in attempting to ascertain

whether two reasonable views are possible or not in the interpretation of a penal provision also. Merely because it is possible for the counsel to argue a proposition it cannot be reckoned as a possible reasonable view. Interpretation is the process of ascertaining the mind of the Legislature. The ascertainment of the mind cannot be done sitting in an island, where only the canons of interpretation in favour of the accused, will inform the interpreter. The nature of the mischief which the Legislation seeks to prevent, the scheme and purpose of the Act, the methodology employed to prevent such mischief, will all have to be taken into consideration to decide whether the competing view is reasonable and possible. I say so because there is strenuous arguments raised in this case based on precedents that the view in favour of the accused is also a possible view. Mere possibility of an interpretation is not the criterion. Whether such interpretation, consistent with the text and context, is reasonable will certainly have to be considered.

10. The third aspect that I would like to bear in mind is that it must always be inherent in the interpreter also to fight against untruth, injustice, vice and crime. The Judicial Chair can only provide the opportunity, but the interpreter must have a basic sense of justice and the commitment to fight injustice, untruth, corruption and evil. It is such an interpreter who will have to identify whether two views are reasonably possible in a given case. The yearning and desire to prevent the abuse/mischief must be inherent in any interpreter. The goals and the purpose of the legislation have got to be imbibed by the interpreter also.

11. Fourthly, I would remind myself that the interpreter must have his feet planted firmly in terra firma. It is not mere possibilities and probabilities which will be taken into account while attempting interpretation. Every interpreter is entitled to take note of Section 114 of the Evidence Act which enjoins on the court the duty to have regard to the common course of

natural events, human conduct and private and public business in their relation to the task ahead.

12. Fifthly, this court must take note of the presumption in favour of legality, constitutionality and correctness of the rules. The nature of the presumption may certainly vary depending on the instrument to be interpreted. It is well known that subordinate legislation will not enjoy the same degree of immunity as a legislative act would. But all the same when rules are made and notifications are published, the burden will undoubtedly be on the person, who wants such rule/notification to be set aside to show that it is necessary to declare them null, void or unconstitutional.'

13. I shall now extract the two amendments which are brought in to the Kerala Abkari Shops disposal Rules, 2002. By Ext.P3 rules, Rule 2(n) (not 2(a) as mistakenly printed) and 9 (2) stand amended and the following rules are introduced. I extract Rule 2 in Ext.P3:

“2. Amendment of the rules – In the Kerala
Abkari Shops Disposal Rules, 2002, -

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-: 10 :-

(1) in rule 2(n) for clause (ii), the following clause shall be substituted, namely:-

“(ii) 'Toddy' in these rules means fermented juice drawn from any coconut, palmyra or Choondapana palms and conforming to such specifications and restrictions as may be notified by Government based on scientific studies and Indian Standard Specifications,”;

(2) for sub-rule (2) of rule (, the following sub rule shall be substituted, namely:-

“(2) No toddy other than that drawn from Coconut, Palmyra, or Choondapana palms and on which tree-tax due under the Act has been paid shall be sold by the licensee. All toddy kept or offered for sale shall be natural and conforming to such specifications and complying to such restrictions as may be notified by Governmnt under clause (n) of rule 2. Nothing shall be added to it to increase its intoxicating quality or strength

or to alter its natural composition or for any other purposes.”

14. These amendments of the rule are followed up by a notification in accordance with the amended Rule 2(n). The said notification – Ext.P4 – is also extracted below:

G.O.(P)No.25/2007/TD Dated, Thiruvananthapuram, 14th February, 2007.

“S.R.O. No. 145/2007:- Under clause (n) of rule 2 of the Kerala Abkari Shops Disposal Rules, 2002, issued under G.O.(P) No.24/2002/TD dt. The 30th March, 2002 and published as S.R.O. No.198/2002 in the Kerala Gazette Extraordinary No.376 dated the 30th March, 2002, the Government of Kerala, based on scientific studies and Indian Standard Specifications in IS 8538/2004, hereby notify that fermented toddy tapped, stored, transported or offered for sale shall conform to the following specifications and comply to the following restrictions, namely -

1. The ethyl alcohol content of coconut toddy shall not exceed 8.1. percent , of Palmyrah toddy,

5.2 per cent and Sago toddy 5.9 per cent by volume.

2. Toddy shall be un-pasteurized and natural and shall possess the characteristic flavour derived from the sap and fermentation, without addition of any extraneous alcohol.

3. If the ethyl alcohol content of toddy exceeds the limit prescribed above, it will be deemed that extraneous alcohol has been added to such toddy to increase its intoxicating quality or strength. For all purposes, such extraneous alcohol will be treated as a foreign ingredient.

4. Toddy shall be free from any added colouring, flavouring, sweetening or other foreign matters; starch, chloral hydrate; paraldehyde; sedatives, tranquilizers and any other Narcotic Drugs or Psychotropic Substances; and any ingredient injurious to health. It shall be free from Escherichia coli also.

5. Total acid as tartaric acid (expressed in terms of 100 litres of alcohol) shall not exceed 400 grams.

6. Volatile acid as acetic acid (expressed in terms of 100 litres of absolute alcohol) shall not exceed 100 grams.”

15. I shall now attempt to understand and extract the nature of the challenge that is raised against Ext. P3 amendment and Ext.P4 notification.

16. The counsel contends that Rule 2(n) and 9(2) are invalid and ultra vires. Consequently it is contended that Ext.P4 notification is invalid as not supported by any valid rules. It is in the alternative further contended that Ext.P4 notification deserves to be set aside as unreasonable and unworkable.

17. Lastly, it is contended that, at any rate, Exts.P3 amendment and P4 notification shall have no bearing in a prosecution under Section 57(a) of the Kerala Abkari Act and for the purpose of Section 57(a) the amended rule and the notification have to be ignored. Consequently it is prayed that the prosecutions may be quashed.

18. I shall first endeavour to consider the contention that Rule 2(n) is not valid. The challenge is raised on the following contentions.

(1) Definition of toddy is made in the rule in addition to the definition in the Act. A different definition in the Rule is impermissible.

(2) The amended definition of toddy in Rule 2(n) overrides the statutory definition in the Abkari Act. This is ultra vires.

(3) The rule suffers from the vice of excessive delegation.

19. The above are the three grounds on which the amendment to Section 2(n) is assailed. Rule 9(2) is further assailed on the ground that it incorporates the amended Rule 2(n) into the rule 9(2) and is consequently unsustainable.

20. Section 3(8) of the Kerala Abkari Act defines toddy in the following words.

“3(8) Toddy:- “Toddy” means fermented or unfermented juice drawn from a coconut, palmyra, date or any other kind of palm tree.

Fermented or unfermented juice drawn from a coconut, palmyra, date or any kind of palm tree would be toddy. Under Section 29(1) of the Kerala Abkari Act the Government is invested with powers to make rules for the purposes of the Act. Section 29(2) enumerates the areas/zone, where the rules can be framed, but specifies that the specification is without prejudice to the generality of the stipulation in Section 29(1) that rules can be made for the purposes of this Act.

21. Toddy must be fermented or unfermented juice drawn from one of the trees specified. If the toddy offered by an Abkari shop is not juice drawn from such tree and instead is made of some other substance which in part may be toddy also, that would certainly be not toddy under Section 3(8). There is need to exclude non-genuine toddy from the sweep of its definition in Section 3(8). It is already excluded. But further clarification is necessary. Specifications to ascertain whether what is offered

as toddy is genuine or non-genuine are necessary. The rule making power under Section 29 must therefore undoubtedly confer on the Government powers to make rules to further amplify the expression toddy, of course, consistent with the definition in Section 3(8). Such rule making power under Section 29 cannot obviously be denied to the Government. The rule can be made "for the purpose of the Act" and it is certainly the purpose of the Act to ensure that the Government permits trade in liquor and regulates the same. That the consumer must get real and genuine toddy is one of the purposes of the Act and therefore the rules can certainly be made to ensure that end.

22. The mere fact that Section 3(8) defines toddy is no reason to assume that the rules cannot be made to make the said definition in Section 3(8) effective and to ensure that the consumer is not given as toddy something that is not genuine juice from the specified trees. Rule 2(n) therefore is perfectly intra vires as what is attempted to be done is to further amplify the expression toddy to ensure that some liquor which may be

intoxicating but is not genuine toddy is not vended in the name of toddy. The purpose is obvious, the rule making power certainly exists under Section 29. Further amplification by Rule 2(n) of the concept of toddy can by no stretch of imagination be held to be beyond the powers conferred under the Act - provided there is no crucial inconsistency with the definition in the parent Act.

23. If the definition of toddy under Section 2(n) runs counter to or destroys the definition in Section 3(8), certainly the contention that the rule is not justified legally will have to be considered. But Rule 2(n) only confers on the Government powers to notify specifications and restrictions regarding toddy on the basis of scientific studies and Indian Standards Specification. Whether the specifications and restrictions in Ext.P4 are unreasonable, unworkable or perverse will be considered when the validity of Ext.P4 is considered. But certainly the rule will not be rendered bad for the reason that Ext.P4 notification is unreasonable, unworkable or perverse. In

such event, the notification will have to be set aside, but certainly not the rule. The argument therefore that the definition again in Rule 2(n) of toddy is ultra vires and beyond the rule making power of the Government under Section 29 cannot be accepted.

24. It is then contended that Rule 2(n) is in direct conflict with Section 3(8) in as much as unfermented juice drawn from the tree will be toddy under the Act, but not under the rules. Unfermented toddy, I must assume, will not be liquor within the definition under Section 2(10) as it does not contain any alcohol. The definition of toddy under the Act takes in unfermented toddy also because a person should not be permitted to tap a tree without paying the tree tax and raise the plea in defence that he has extracted the sap of the tree even before fermentation has started taking place. That is a totally different purpose. Having a different definition on that limited aspect for the purpose of the Kerala Abkari Shops Disposal Rules cannot in any way be said to be bad. Toddy for the purpose of Abkari Act and toddy

for the purpose of the Kerala Abkari Shops and Disposal Rules can and may have different meanings provided that the definition in the rule does not destroy or run counter to the definition in Section 3(8). More over, for the purpose of our dispute, it is not relevant or necessary to go in detail to the question of unfermented juice from the palm tree which may be toddy under Section 3(8) and may not be toddy under Rule 2(n). Unfermented toddy will continue to be toddy notwithstanding the amended Rule 2(n) in as much as it will not contain any alcohol and shall be within the maximum percentage of ethyl alcohol fixed under Rule 2(n).

25. The third contention raised is that the rule is bad for excessive delegation. It was urged initially in the course of arguments that the Government has delegated to itself the powers to make a notification under Section 2(n) and this therefore amounts to excessive impermissible sub-delegation. But in the course of arguments the learned counsel for the petitioner Sri. C.C. Thomas did not press this contention and

therefore it is not necessary for me to go into that contention in any greater detail. The burden, responsibility and duty to make notification is not delegated to any one, but is retained with the Government itself and in these circumstances the plea of excessive delegation which is not pressed need not be considered in any greater detail.

26. The above discussions lead me to the conclusion that the amendment by which a definition of toddy has been introduced in the Kerala Shops Disposal Rules does not at all warrant any interference. The amended rule 2(n) is held to be valid.

27. No independent contention is urged to assail Rule 9 (2). Except to argue that Rule 2(n) is bad and incorporation of the amended Rule 2(n) in Rule 9(2) is consequently invalid, no other grounds are raised. The above discussions lead me to the conclusion that amended Rule 2(n) and 9(2) are perfectly legal and valid and they do not warrant any interference.

28. We now come to the question whether Ext.P4 notification is legal and valid. I have already extracted Ext.P4 notification earlier. The challenge in this proceedings is directed pointedly against clauses 1 and 3 of the notification, which for immediate reference, is extracted below again:

“1. The ethyl alcohol content of coconut toddy shall not exceed 8.1. percent , of Palmyrah toddy, 5.2 per cent and Sago toddy 5.9 per cent by volume.

3. If the ethyl alcohol content of toddy exceeds the limit prescribed above, it will be deemed that extraneous alcohol has been added to such toddy to increase its intoxicating quality or strength. For all purposes, such extraneous alcohol will be treated as a foreign ingredient.

(emphasis supplied)

If the notification is unreasonable and it makes the operation of the Statute unworkable, undoubtedly the notification can be set aside. The vital question is whether prescription in clause (1) that ethyl alcohol content of coconut toddy, palmyra toddy and sago toddy cannot exceed 8.1%, 5.2% and 5.9% by volume is reasonable and proper.

29. Heavy reliance is placed on the decisions in **Unni** v. **State of Kerala** (2003 (3) KLT 306) (SB), **State of Kerala** v. **Unni** (2005 (1) KLT 714) (DB) and **State of Kerala** v. **Unni** (2007 (1) KLT 152)(SC). The learned counsel for the petitioners contends that it has already been held by the said decisions that the prescription of 8.1% as the maximum percentage of ethyl alcohol in toddy is unreasonable. No better or more scientific studies have been conducted by the State subsequent to those decisions to hold that such prescription is legal and valid. All materials presently relied on by the State in support of such specifications were before the learned Single Judge, Division Bench and the Supreme Court when they rendered the above three decisions. In these circumstances the subsequent fixation of the maximum percentage of ethyl alcohol in toddy in clause (1) of Ext.P4 must be held to be improper, unreasonable, unsustainable and perverse. For the same reasons that are referred to in the said three decisions the

notification must be held to be bad. This in short is the contention raised.

30. The learned Prosecutor, on the contrary, contends that the courts earlier had no occasion to consider whether fixation of the maximum percentage of ethyl alcohol in toddy as shown in clause (1) of Ext.P4 as also in the earlier rule 9(2) was scientifically correct or not. All the three courts took into consideration clause 6(a) of the Excise Manual, which as it then stood, suggested that fermented liquor (toddy, beer or wine) could have maximum self generated alcohol content not exceeding 12% by volume. All the three courts took note of the further fact that paragraphs 4, 5 and 6 of Chapter X contained in Volume 2 of the Excise Manual as it then stood suggested that the alcoholic strength of 8.1%, 5.2% and 5.9% was "the average" alcoholic strength on fermented toddy at the peak point of fermentation.

31. The learned Prosecutor contends that inadequate and inexact provisions in the Kerala Excise Manual which suggested that self generated alcohol could be present upto 12%

by volume in all fermented liquors including toddy had persuaded the courts to take such a view. Similarly, the use of the expression "average" in paragraphs 4, 5 and 6 of Chapter X in Volume 2 of Excise Manual had persuaded the courts to take the view that the percentage of self generated alcohol can in a given case exceed the maximum average strength shown therein. The Excise Manual has been amended subsequently. Ext.R1(b) is the Govt. Order dt.14.2.07 comprehensively considering the Excise Manual. It is now clear that genuine toddy as per the amended Excise Manual can never have self generated ethyl alcohol in excess of 8.1%. 8.1% is the maximum of ethyl alcohol that can be present in genuine toddy it is now evident, it is submitted.

32. I have been taken through all the three decisions in detail. I am in agreement with the learned Prosecutor that the learned Single Judge, the Division Bench and the Supreme Court had no occasion at all to consider whether scientifically it is correct to say that genuine toddy cannot have self generated alcohol in excess of 8.1% whatever the tree source. In view of

the stipulations in the Excise Manual, which have been referred to in all the three decisions, which indicated that fermented liquors (without making any distinction between toddy, beer and wine) could have self generated alcohol not exceeding 12% and that the prescribed maximum ethyl alcohol strength in toddy from various sources was only “average” and not necessarily the possible maximum, such conclusions were drawn. The courts, I do particularly note, had not specifically considered the acceptability of the contention that self generated alcohol cannot exceed the percentage shown in Rule 9(2) as it then stood because of the unquestioned stipulations in the Excise Manual, which suggested contra. It is in this context, I conclude, that the Supreme Court had expected the State to undertake deeper study in the matter (See para 29). I extract below paragraphs 28 and 29 of the Judgment of the Supreme Court, which clearly points to this conclusion.

“28. We have noticed the definition 'toddy'. It does not limit the extent of fermentation. Fermented toddy would, therefore, come within the purview of

definition of toddy. Manufacture and sale of toddy, which is fermented, is not prohibited. Excise Manual clearly points out that the contents of ethyl alcohol by reason of fermentation in toddy can go upto 12%, whereafter only it ceases to be a toddy. While laying down the norms in Excise Manual, the State had used the words "average yield". The percentage specified therein, thus, is only average.

29. If by reason of the rule making power, the State intended to impose a condition, the same was required to be reasonable one. It was required to conform to the provisions of the statute as its violation would attract penal liability. It was expected to be definite and not vague. Indisputably, the State having regard to the provisions of Article 47 of the Constitution of India, must strive hard to maintain public health. While, however, imposing conditions in regard to the prescription of norms, it was expected of the State to undertake a deeper study in the matter. It should have undertaken actual experiments. It should have specified mode and manner in which the percentage of ethyl alcohol can be found out by the licensee. A subordinate legislation can be questioned on various grounds. It

is also well known that a subordinate legislation would not enjoy the same degree of immunity as a legislative act would. (See Vasu Dev Singh & Ors. v. Union of India & Ors. (2006 (11) SCALE 108).

(emphasis supplied)

33. The learned Prosecutor submits that the Excise Manual as it then stood was not intended to specify that maximum ethyl alcohol which could be present in toddy could go upto 12%. Toddy, beer and wine were reckoned to fall in the common category of fermented liquors and the maximum self generated alcohol content that could be present in the common category of fermented liquor was prescribed as 12%. All of them taken together, this stipulation is even now correct. But so far as toddy is concerned, the maximum alcoholic strength can only be 8.1% (that is, in coconut toddy) and thereafter no further fermentation can take place to cause further increase in the percentage of self generated ethyl alcohol. The bacteria causing fermentation get destroyed and conversion to acetic acid takes place thereafter.

34. The acceptability of this scientific conclusion was not considered by the courts in the three decisions referred above because of the stipulations in the Excise Manual, which suggested contra. The learned Prosecutor submits that the Excise Manual has now been amended to delete these stipulations, which created doubt in the minds of the Courts. The learned Prosecutor submits that the stipulation that ethyl alcohol percentage in coconut, palmyra and sago toddy cannot exceed 8.1% 5.2% and 5.9% by volume is a scientific truth, which has been confirmed by the materials available with the Government, which have been reconsidered before the notification in question was issued. The learned Prosecutor places reliance on the specification of the Bureau of Indian Standards and also the opinion received from competent chemical examiners on this aspect.

35. The burden undoubtedly is on the person, who challenges Ext.P4, to show that the maximum percentage of ethyl alcohol in toddy can exceed the maximum percentage fixed

in clause (1) of Ext.P4 for natural reasons. That self generated alcohol in toddy can exceed the prescribed maximum percentage must be shown atleast to be probable by the person who assails Ext.P4. Not a scintilla of material is placed before me to persuade me to accept such challenge. The materials placed before court by the Prosecutor clearly shows contra.

36. The three decisions referred above do not at all consider the correctness of this scientific theory that the percentage of self generated alcohol cannot ever exceed the maximum stipulation in clause (1) of Ext.P4. In view of the stipulations in the Excise Manual, it was assumed that the self generated alcohol in fermented liquor, including toddy, can go upto 12% and that the stipulation that the toddy offered for sale cannot have ethyl alcohol in excess of 8.1% is unreasonable. That is why the courts had proceedd to discuss whether vendor has the means to test and verify whether self generated ethyl alcohol which could go upto 12% had crossed the magic figure of 8.1%. In view of those stipulations of the Excise Manual, the

State did not urge and the courts did not consider the acceptability of the scientific input that self generated alcohol in toddy cannot exceed 8.1%. After the said incongruities are removed from the Excise Manual by amendment, the three decisions above referred cannot help the petitioners.

37. The learned counsel for the petitioners raised the only contention that the courts in the three decisions referred above have refused, while considering the challenge against the earlier Rule 9(2), to accept that the maximum percentage of alcohol in toddy can be as prescribed under the earlier Rule 9 (2), which is repeated in clause (1) of Ext.P4. Except that assertion, there is not a scintilla of material before court to assail that scientific conclusion, which is justified by the materials placed before court. I must, in these circumstances, hold that the contention that the stipulation in clause 1 of Ext.P4 is not scientifically justified, is perverse and consequently the notification is unreasonable and unworkable cannot be accepted.

38. The next question is whether clause (3) of Ext.P4 deserves to be set aside for any reason. If we accept clause (1) and agree that self generated alcohol cannot exceed the maximum percentage fixed in clause (1), it is an elementary rule of prudence and reasonable analytical thought and deduction that if alcohol in excess of the maximum prescribed is present in any given sample of toddy, it must have been added to toddy. Who added it , why and when it was added, are all questions to be considered in the facts of each case. With or without clause (4) of Ext.P4 any reasonably prudent mind, if the stipulation in clause (1) is scientifically acceptable, will have to conclude that excess alcohol present beyond the maximum permissible (possible) self generated alcohol, must have been added to the sample of toddy. It does not require the wisdom of Solomon to sail to this very plain, reasonable and rational conclusion. Clause (3) has only re-iterated this rule of elementary prudence and reasonableness. I am unable to accept that there is anything in clause (3) which can be held to be unreasonable,

irrational, perverse or unworkable as to persuade this Court to judicially review and interfere with the said stipulation. As stated earlier, with or without the stipulation in clause (3) of Ext.P4 any reasonably prudent mind will have to accept the stipulation from fundamental analysis, rational thought and reasoning. Of course, in a given case, it will be open to the party concerned to show contra if that be possible. At best, clause (3) of Ext.P4 can be reckoned only as a permissible presumption of the 'may presume' variety under Sections 3 and 114 of the Evidence Act. In an appropriate case the expressions 'deemed' and 'will be treated' in clause (3) of Ext.P4 can be read down to mean only that. Clause 3 of Ext.P4 notification cannot be read and understood as a stipulation overriding those in Section 57(a) of the parent Act. If alcohol in excess of the maximum stipulated in clause 1 of Ext.P4 were present, it would be reasonable to proceed on the assumption that such excess alcohol must have been added to toddy. This is all that cause 3 stipulates. It therefore suffers from no vice. The contention

that the notification under that Rule virtually amends the parent Act is without any substance.

39. In this view of the matter, I find absolutely nothing to justify the challenge against the stipulation in clause (3) of Ext.P4. The challenge against Ext.P4 must also in these circumstances be rejected.

40. Lastly and finally it is contended that in any view of the matter, the prosecution under Section 57(a) of the Kerala Abkari Act cannot be validly instituted against the petitioners on the ground that the percentage of toddy exceeds the maximum prescribed in Ext.P4. I extract Section 57(a) below.

“Whoever

“(a) mixes or permits to be mixed with the liquor or intoxicating drug, sold or manufactured by him (any drug, other than a noxious drug) or any foreign ingredient likely to add to its actual or apparent intoxicating quality or strength. or any article prohibited (other than an article which the Government shall deem to be noxious) by any rule made under Section 29, clause (k), when such admixture shall not amount to the offence of

adulteration under (section 272 of the Indian Penal Code)”

It is contended that the Division Bench had adverted to this question in detail in paragraphs 9 and 10 of the decision in 2005 (1) KLT 714.

41. I do note that the Division Bench has observed as below, in paragraphs 9 and 10 of the said judgment.

“9. Regarding S.57(a) of the Act, the contention is that there is absolutely no allegation that any foreign ingredient was mixed or permitted to be mixed in the contraband toddy by the respondents or anybody acting under them. According to the respondents, ethyl alcohol being an essential component or ingredient of toddy, the presence of the above ingredient cannot be said to be a “foreign ingredient”, even if the percentage of that ingredient, viz. ethyl alcohol is in excess of the percentage fixed as the standard as per Rules. According to the counsel for the respondents, S.57(a) being a penal provision should be construed strictly and since the Legislature by express words or otherwise, has not made it clear that an article which

is otherwise an ingredient of toddy will also fall within the mischief of the expression 'foreign ingredient', if the same is found in excess of the standard fixed or the permitted quantity or percentage, prosecution of the respondents under S.57(a) is illegal and liable to be quashed. In the realm of interpretation of the penal statutes when two views are reasonably possible, Courts should adopt that interpretation which is favourable to the accused. We are of the view that the interpretations canvassed by the learned counsel for the respondent is a plausible view, at any rate, not unreasonable. Hence the benefit should go in favour of the person facing prosecution.

10. Smt. Vaheeda Babu, Government Pleader, submitted that S.57(a) has got a laudable object and having regard to the purpose for which that provision is incorporated in the statute, it has to be construed in such a manner that the said object is advanced and the mischief is suppressed. We do agree that in the matter of interpretation of statutes which are not penal, the above proposition finds acceptance as a sound principle of law. Here, the

situation is different. It cannot be disputed that ethyl alcohol is an ingredient of toddy. The dictionary meaning of 'foreign' shows that 'anything that is extraneous is foreign.' In our view, ethyl alcohol being an essential ingredient of toddy, there is merit in the contention that it is not as such a foreign ingredient, even if ethyl alcohol may be present in excess of the percentage permitted by the Rule. The object of S.57(a), is to prosecute offenders who commit the offence of mixing or who permit mixing of any foreign ingredient or other materials specifically mentioned therein. Since we have found that the mere presence of ethyl alcohol, even if in excess of the permitted quantity, cannot be treated as a foreign ingredient, the writ petitioners are not liable to be prosecuted under S.57(a) of the Abkari Act. We may observe here that if the presence of ethyl alcohol in toddy beyond the percentage permitted by the Rule has to be deemed to be a 'foreign ingredient' it is for the Legislature to incorporate necessary amendments in the Act. Be that as it may, the light of the language used in S.57 (a), we hold that the respondents are not liable to be prosecuted for that offence."

42. It must be noted that such conclusion was drawn when there was no material to show that the maximum percentage of alcohol in toddy cannot exceed the limits prescribed in Ext.P4. If we accept the stipulation in clause (1) of Ext.P4 as scientifically sound and reasonable, I have no doubt that the Division Bench would not have taken that view. If the maximum percentage of self generated alcohol in toddy can only be as prescribed in the rule, anything in excess must certainly be held to be foreign and not natural. The expression 'foreign ingredient' in S.57(a) must certainly take in any ingredient which is not natural. Merely because natural toddy may also have an ingredient, which the added article also has, it cannot be held that such ingredient is not a foreign ingredient. The purposive rule of interpretation will have to be accepted in this context. The purpose is to prevent addition of foreign material to toddy to enhance its intoxicating quality. Addition of arrack/spirit to toddy will enhance its intoxicating quality. Merely because natural toddy and spirit/arrack added may both

contain ethyl alcohol, it cannot be held that ethyl alcohol present in toddy in excess of the permitted and possible maximum in natural toddy is not a foreign ingredient. The question is not whether ethyl alcohol is a natural ingredient or not. The question is whether ethyl alcohol present in excess of the permissible (possible) maximum is a 'foreign ingredient' or not. In the light of the scientific truth accepted earlier, it would be myopic to conclude that such excess alcohol will not be 'foreign ingredient

43. Before the Division Bench it was not argued or accepted, I see, that the maximum percentage of ethyl alcohol in natural toddy cannot exceed the percentage shown in clause (1) of Ext.P4. Whatever is not a natural ingredient if present in toddy, must be held to be a foreign ingredient. Alcohol in toddy upto the maximum prescribed (possible) extent alone can be held to be the natural ingredient and ethyl alcohol in excess of the prescribed percentage must be held to be a foreign ingredient. In this view of the matter, I am of the opinion that

the observations in paragraphs 8 and 9 cannot be held to conclude the issue in as much as the Division Bench did not have occasion to consider the uncontroverted scientific truth now pressed into service that natural toddy cannot have ethyl alcohol in excess of the extent prescribed in clause (1) of Ext.P4.

44. Relying on the observations in paragraph 10, it is finally contended that an amendment of the rule is not sufficient to bring about a change in the law as held in the three decisions referred above. An amendment of the Act is invariable, it is contended. This contention is built on the following observations in paragraph 10:

“ We may observe here that if the presence of ethyl alcohol in toddy beyond the percentage permitted by the Rule has to be deemed to be a 'foreign ingredient' it is for the Legislature to incorporate necessary amendments in the Act. Be that as it may, in the light of the language used in S.57(a) we hold that the respondents are not liable to be prosecuted for that offence.”

(emphasis supplied)

45. I am unable to accept this contention either. A judgment of the court cannot be read as a piece of legislation. When the learned Judges of the Division Bench observed that necessary amendments “in the Act” must be brought about, evidently they had only amendments to the law in question. It cannot be held from such observation alone that amendment of the rule is insufficient to alter the position of law. The amendment of the provisions of the Excise Manual, the valid amendments to Rule 2(n) and Rule 9(2) and Ext.P4 notification, which I have held to be valid, bring about sufficient changes in the law to satisfy the said observations extracted above.

46. I may re-iterate the conclusions as follows:

(1) The amendment to rule 2(n) and Rule 9(2) are perfectly legal, valid and constitutional.

(2) Ext.P4 notification does not deserve to be set aside on the ground that it is unreasonable, irrational, unworkable and perverse.

(3) When the percentage of alcohol in a given item of toddy exceeds the maximum percentage fixed under clause (1) of Ext.P4, it is reasonable to infer that such excess alcohol has been added to toddy.

(4) The presence of alcohol in excess of the maximum of self generated alcohol, which can possibly be present in natural and genuine toddy can reasonably be assumed to be an added foreign ingredient in a prosecution under Section 57(a) of the Kerala Abkari Act.

(5) In a prosecution under Section 57(a), the Court can certainly draw the reasonable permissive presumption that excess percentage of alcohol in toddy is added to toddy. The indietee will certainly have the option to rebut that reasonable presumption of prudence notwithstanding the stipulations of clause (3) in Ext.P4. The question whether the excess alcohol present is added or not will have to be decided in the light of the presumption of prudence, which is reiterated in clause (3) of

Ext.P4. Even without clause (3) of Ext.P4 the presumption of prudence can be drawn under Section 114 of the Evidence Act.

47. It follows from the above discussions that these petitions do not deserve to succeed. They are dismissed. I may however hasten to observe that I have not intended to express any final opinion on the acceptability of the allegations raised against the petitioners in the given prosecutions. They shall be at liberty to raise all their contentions before the learned Magistrate in the light of the conclusions drawn above.

**(R. BASANT)
Judge**

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